No. 76-35

In the Supreme Court of the United States

OCTOBER TERM, 1976

FRANK DU BOIS CHEW, SR., AND
FRANK HARRY CHEW, JR., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App.) is not reported. The court's order of affirmance is reported at 534 F. 2d 334.

JURISDICTION

The judgment of the court of appeals was entered on April 28, 1976. A petition for rehearing was denied on June 9, 1976. The petition for a writ of certiorari was filed on July 12, 1976, and therefore is out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners received effective assistance of counsel at trial.

2. Whether the defense of entrapment was fairly raised by the evidence.

STATEMENT

After a jury trial in the United States District Court for the District of Arizona, petitioners were convicted on four counts charging: (a) conspiracy to transport forged securities in foreign commerce and commit wire fraud (Count 1); and (b) the completed substantive offenses (Counts 2-4), in violation of 18 U.S.C. 371, 2314, and 1343. Both petitioners were sentenced to concurrent terms of imprisonment for three years. The court of appeals affirmed (Pet. App.).

1. The government's evidence showed that in June 1973 Bruce Cooper, a resident of Scottsdale, Arizona, received a telephone call from Garrett Renouf, an acquaintance in London, England. Renouf informed Cooper that a group of individuals in London, including co-defendants Renouf and William White, had obtained control of a shipping company for the purpose of passing fraudulent bills of lading in foreign commerce (Tr. 21-24).[1] Cooper, a government informant, was asked to locate individuals in the United States who might be interested in participating in the scheme. Cooper related the conversation to petitioner Chew, Jr., who remarked that he would consult with his father (Tr. 25-26). A few days later Chew, Jr. was in Cooper's office in Phoenix when Renouf called again. Chew, Jr. and Renouf spoke at length, eventually agreeing upon a plan whereby Renouf would ship to Los Angeles, California, containers of an inexpensive metal, which would be depicted on altered bills of lading as platinum. The slowest form of transportation possible was

[1]We are lodging with the Clerk of this Court the five-volume transcript of the trial proceedings.

to be employed in order to provide ample time for the English conspirators to fly to the United States and, before the shipment arrived, obtain a large amount of money from a lender, using the altered bills of lading as security.

In August 1973, the conspirators in London created two sham enterprises, Peter Van Eck and Company and McNeil Shipping Company (Tr. 58). Thereafter, they arranged for a shipment by boat of two crates of nails to Los Angeles, California. The shipping documents indicated that Peter Van Eck was the consignor and Chew, Sr. the consignee. The shipment left London on September 7, 1973 (Tr. 34, 291-295, 308, 331-333).

On September 13, while the shipment was on the high seas, Renouf and White flew to Arizona with shipping documents that had been altered to describe the shipment as platinum (Tr. 39, 409). At a meeting in Phoenix, attended by the Englishmen, the Chews and Cooper, White displayed two sets of shipping documents, each for one of the crates in transit (Tr. 43). The parties agreed that a contract would be prepared, reflecting transfer of the platinum by Renouf in exchange for the foreign licensing rights to a smoke arrestor device which Chew, Sr. had invented and patented. Renouf produced a diplomatic passport containing his picture but no name. He inscribed the name "Robert Stewart" on the passport, and indicated that he would use that name thereafter. The contract with Chew, Sr. was drawn up with "Stewart" listed as the other party to the transaction (Tr. 44-45).

Petitioners then set about seeking prospective lenders. Three separate sources were pursued; none was successful.

a. One proposed transaction had its origin when Chew, Sr., asked an acquaintance, Charles Dyer, whether he

knew anyone who might lend him approximately one million dollars with a platinum shipment as collateral (Tr. 45, 91-98). Dyer made several inquiries displaying photocopies of shipping documents which Chew, Sr. had provided. Brokers contacted by Dyer expressed some concern about the absence of certain information on the documents. Nevertheless, Dyer's inquiries led to the discovery of a prospective lender, Charles Peick. On September 27, 1973, a meeting was held in Peick's office in El Cerrito, California. Among those in attendance were Chew, Sr. and Renouf (using the alias "Stewart"). A tentative agreement was reached there for a loan of $1,500,000 secured by the platinum. However, Peick made several demands that proved unacceptable to Chew Sr., and Renouf. Among other things he insisted that the platinum by assayed and that the borrowers pay $5,000 to offset initial expenses (Tr. 227-230).

On September 28, 1973, Chew, Sr. and Renouf proceeded to the Los Angeles docks where they asked Sandra Marlowe, a customs broker, about the shipment, which had just arrived (Tr. 369-370). Chew, Sr. and Renouf discussed with Miss Marlowe terms for storing the two crates, which Chew, Sr. said contained platinum ingots (Tr. 374). Because it was late Friday afternoon, no action could be taken regarding the shipment; Chew, Sr. and Renouf agreed to contact Miss Marlowe the following Monday, October 1 (Tr. 371, 382). Chew, Sr. gave Miss Marlowe Bruce Cooper's business card, indicating that he and Renouf could be reached at the telephone number on the card. Neither Chew, Sr. nor Renouf contacted Miss Marlowe on October 1 (Tr. 382-383). A few days later Renouf and White flew back to England with the original shipping documents and did not return to the United States thereafter.

b. Albert Stout, a Phoenix real estate salesman, was told by Chew, Jr. that he was looking for a loan to be secured by a quantity of platinum (Tr. 416). Stout passed this information to his acquaintances and, as a result, brought together Chew, Jr. and John C. Jeffers (Tr. 417). At a meeting in November 1973 attended by both petitioners, Stout, and Jeffers, the loan proposal was discussed at length. Chew, Sr. stated that the platinum was acquired as payment for certain patents, in lieu of cash, which could not be removed from England (Tr. 428-430). Chew, Sr. displayed his copies of the altered shipping documents. Chew, Jr. told the others that he had known the assignees of the patents in England and had taken part in setting up the assignment transaction (Tr. 431).

The parties met again in January 1974 to discuss a plan by Jeffers to move the platinum to Zurich, Switzerland, for storage. Jeffers had sent an agent to Zurich to prepare for the transaction (Tr. 435-436). Although Jeffers and the Chews discussed the project almost daily thereafter, they reached no binding agreement. In the meantime, Chew, Jr. proposed the loan transaction with Melvin Bangle, an associate of Jeffers. In February 1974 the Chews signed an agreement naming Bangle and Jeffers as exclusive agents for the loan for a period of time (Tr. 504-505). Bangle and Jeffers expected Chew, Sr. to notify Renouf and White (who still had the original copies of the shipping invoices) to return to the United States to complete the transaction. On numerous occasions Bangle and Jeffers asked when the Englishmen would arrive; each time petitioners furnished an excuse for the Englishmen's failure to travel immediately to the United States (Tr. 507).

c. Contemporaneous with the dealings with Jeffers and Bangle, Chew, Jr. negotiated with John Brennan

for the sale of the platinum. Chew, Jr. displayed copies of the shipping documents and insurance forms to Brennan (Tr. 541-543). He told Brennan that his father had seen the platinum and had described their appearance as two-kilogram bars (Tr. 544). These two drew up an exclusive agency agreement (Tr. 551).

2. Because Chew, Sr., the named consignee, had not cleared the shipment within ten days of arrival, as required by customs regulation, a customs agent took control of the crates. Upon opening them, he discovered that they contained common nails (Tr. 358-359). A laboratory analysis confirmed that the nails were not made of platinum (Tr. 362-363). On March 28, 1974, FBI agent Barry Gwinn advised Chew, Sr. of the discovery of the nails and results of the laboratory test. Gwinn asked Chew, Sr. whether he clearly understood the nature of the shipment; Chew, Sr. replied that he would not file a formal complaint with the customs service but would examine the possibility of suing the insurance company to recover the value of the shipment (Tr. 474). That same afternoon Chew, Sr. met with Jeffers and continued his negotiations for a loan. The parties met regularly for weeks afterward; Chew, Sr. never informed Jeffers or Bangle that there was no platinum in the crates (Tr. 447-449). Nor did the Chews inform Brennan of the agent's discoveries while they continued deliberations for what Brennan believed to be a purchase of platinum (Tr. 560-562).

3. In their defense, petitioners summoned two witnesses who testified to the potential value of the process that Chew, Sr. had patented, which had been held out as the basis for his receipt of a quantity of platinum in payment for licensing privileges abroad (Tr. 599-607, 738-743). Both petitioners took the witness stand and, in essence, avowed that they were unaware of any

fraudulent conduct in the course of what they believed to be a lawful business transaction. Chew, Jr. denied discussing any subterfuges with Cooper or Renouf (Tr. 682); Chew, Sr. denied knowledge of either Renouf's true name or the fraudulent nature of the shipping documents (Tr. 787-791). In explanation for continued dealings with prospective buyers and lenders even after the FBI agent's interview, petitioners stated that they had made no affirmative attempts to complete deals for the shipment and that both Brennan and Bangle had persisted in efforts to negotiate (Tr. 701, 784). Chew, Jr. stated further that after Bangle was interviewed by Agent Gwinn, Bangle had telephoned to report that he had made an independent inquiry and had discovered that the shipment of platinum actually existed (Tr. 701).

ARGUMENT

1. The court of appeals rejected petitioners' claim of inadequate representation, by citing (Pet. App. 6a) its prior decision in *Hayward* v. *Stone*, 527 F. 2d 256 (C.A. 9), which held that representation will not be deemed constitutionally inadequate unless it is so poor as to reduce the trial to a farce and mockery of justice. As petitioners note (Pet. 13), several circuits have recently discarded the "farce and mockery" test. *Beasley* v. *United States*, 491 F. 2d 687 (C.A. 6); *United States* v. *DeCoster*, 487 F. 2d 1197 (C.A. D.C.); *West* v. *Louisiana*, 478 F. 2d 1026 (C.A. 5). Cf. *United States* v. *Yanishefsky*, 500 F. 2d 1327, 1333, n. 2 (C.A. 2). In its place, these courts have adopted a standard of "reasonableness" that they consider to be less stringent. Petitioners urge this Court to determine the appropriate standard. But even if the existing difference among the circuits otherwise constitutes a significant conflict concerning the constitutional minimum, their representa-

tion at their lengthy trial was competent and constitutionally adequate. Cf. *Dunker* v. *Vinzant*, 505 F. 2d 503 (C.A. 1), certiorari denied, 421 U.S. 1003.

Petitioners' claim of inadequate representation is based on their counsel's failures to object to evidence of acts of misconduct not charged, to cross-examine Agent Gwinn regarding Cooper's bias, and to seek a new trial (Pet. 11). But each of those "failures" represents a tactical decision based upon the trial situation and the nature of the evidence. The evidence of uncharged acts related largely to Renouf. Since the acts were not criminal, and thus the evidence not significantly prejudicial, an objection would probably have been denied (see Tr. 250, 253-254, 266, 310, 661). Cooper's status was fully disclosed to the jury, so that cross-examination of Agent Gwinn concerning Cooper's cooperation with the F.B.I. was unnecessary (Tr. 623-624, 631). Counsel's trial decisions concerning those matters were thus well within the standard of reasonableness. Moreover, petitioners suggest no substantial basis for a motion for a new trial. See also p. 9, *infra*. Thus the Fifth Circuit's observation in a similar case (*United States* v. *Hand*, 497 F. 2d 929, 935, affirmed on rehearing *en banc*, 516 F. 2d 472, certiorari denied, March 8, 1976, No. 75-621, is pertinent here as well:

> Nothing is advanced which may not be viewed either as a legitimate tactical choice, the relinquishment of an untenable position or, at worst, an honest mistake. We take occasion to reiterate both that we do not view such roundings on trial counsel with favor and that there is a wide expanse of tolerance for ability of counsel between success in the case and an inadequacy so extreme and so clear as to offend the Constitution.

2. Several months after petitioners' trial the Ninth Circuit, sitting *en banc*, resolved an intra-circuit conflict by ruling that a defendant could allege at trial—albeit inconsistently—both that he had not committed the acts charged and that he had been entrapped. *United States* v. *Demma*, 523 F. 2d 981. On appeal of their convictions, petitioners contended that, in light of the ruling in *Demma*, they were entitled to a new trial and an instruction on the defense of entrapment. The court of appeals rejected this argument on the ground that there was insufficient evidence in the record to warrant an entrapment instruction.

As the court correctly noted, "[a]n exhaustive reading of the transcript of the trial" (Pet. App. 3a) disclosed that "[t]he only suggestion that the Chews did not instigate this crime and were inveigled into committing these acts is in the final argument to the jury by their counsel" (*id.* at 3a-4a). The Ninth Circuit's resolution of its own previously inconsistent rulings on the availability of an entrapment defense therefore had no bearing upon petitioners' case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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